JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

FRANK RIPULLO, **Plaintiff,** **v.** **LEONARD NASS and DOES 1 through 50, inclusive,** **Defendants.**	**Case No.: SACV 17-00257-CJC(JCGx)** **ORDER GRANTING DEFENDANT'S MOTION TO TRANSFER VENUE TO UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY**

I. INTRODUCTION

Plaintiff Frank Ripullo filed this action against Defendant Leonard Nass and Does 1 through 50, inclusive, in Orange County Superior Court on January 11, 2017. (Dkt. 1-2 [Complaint, hereinafter "Compl."].) Ripullo brings eight causes of action: false promise, intentional misrepresentation, negligent misrepresentation, constructive trust, accounting, breach of contract, money had and received, and violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. (*See generally id.*) Nass removed the action to this Court on the basis of diversity jurisdiction on February 13, 2017. (Dkt. 1.) Before the Court is Nass' motion to transfer venue to the United States District Court for the District of New Jersey. (Dkt. 12.) For the following reasons, the motion is GRANTED.[1]

II. BACKGROUND

Nass founded Compression Therapy Concepts, Inc. ("CTC"), in 1999. (Compl. ¶ 1.) CTC primarily manufactures, develops, and distributes medical devices aimed at preventing or treating deep vein thrombosis. (*Id.*) Nass and Ripullo met in New Jersey in 2007, when Ripullo was working as Vice President and National Sales Manager for a medical device company, ArjoHuntleigh, located in New Jersey. (Dkt. 12-1 [Declaration of Leonard Nass, hereinafter "Nass Decl."] ¶ 3.) Ripullo later went on to own and operate Essential Healthcare Management, Inc. ("EHM"), which provided marketing and distribution services. (Compl. ¶ 2.) According to Nass, after Ripullo's relationship with ArjoHuntleigh ended and he started EHM, he made "overtures" to Nass to be retained by CTC to perform national sales management duties as an independent contractor. (Nass Decl. ¶ 3.)

Ripullo, through his company EHM, entered into three written agreements with CTC (the "Agreements") which "establish the relationship and role" of EHM vis-à-vis CTC and define Ripullo's compensation terms (a base monthly retainer plus quantitative commission for his services). (*Id.* Exs. 3, 5, 6, 8.) The first, dated November 1, 2007,

[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for May 1, 2017, at 1:30 p.m. is hereby vacated and off calendar.

lasted until October 31, 2010, the second, entered into on November 1, 2010, extended until October 31, 2013, and was amended to last until October 31, 2015, and the final contract was entered into on November 1, 2015. (*Id.* Exs. 3, 5, 6, 8; *id.* ¶¶ 4–7.) Each of these Agreements contains the following forum selection clause: "All incidents of this Agreement shall be governed, construed, and enforced in accordance with the laws of the State of New Jersey, and all legal actions arising out of this Agreement shall be subject to the exclusive jurisdiction of the appropriate Federal or State courts of the State of New Jersey." (*Id.* Exs. 3, 5, 8.) Ripullo drafted the original agreement containing this forum selection clause, and the parties made subsequent revisions but never changed the language of this clause. (*Id.* ¶ 9.)

Ripullo alleges that after he began working for CTC he secured relationships between CTC and large group purchasing organizations ("GPOs") and integrated delivery networks, beginning with his large-scale placement of CTC's products with a GPO known as Premier in or about 2009. (Compl. ¶ 3.) Nass was "exceptionally pleased" with Ripullo's performance in securing this placement, which "resulted in an immediate increase of CTC revenues, and, within a few short years, CTC revenue would increase more than tenfold as a result." (*Id.* ¶ 4.)

Ripullo alleges that, as a result of his initial success, Nass asked him to take on an expanded role at CTC. (*Id.* ¶ 4.) Though he initially declined, he changed his mind when Nass allegedly made an oral promise to Ripullo in 2011 that, in exchange for taking on a larger role, Nass would grant Ripullo an equity interest equal to that of Nass in CTC. (*Id.* ¶¶ 4–5.) Ripullo claims that the oral promise means he is entitled to at least a one-third interest in CTC. (*Id.* ¶ 5.) At the time, CTC had one other owner—Marilyn Crocker—whom Ripullo alleges "on paper" held an interest in CTC at least equal to that of Nass. (*Id.*) Ripullo claims Nass told him that Crocker was "simply a front or token representative of CTC so that Mr. Nass could claim CTC was a minority or woman based enterprise," and that Nass was the true majority owner. (*Id.*) Nass, however, maintains that Ms. Crocker was the majority shareholder who handled the daily activities of CTC as its Chief Executive Officer, and that Nass was CTC's Vice President. (Nass Decl. ¶ 2.) According to Nass, no shareholder of CTC could issue or transfer shares without the other shareholder's consent. (*Id.*)

After this alleged promise was made, Ripullo apparently assumed a larger role at CTC. (Compl. ¶ 7.) He "took on the added functions of internal governance of CTC and setting policy for CTC," including hiring and firing of personnel, overseeing 30 or 40 outside CTC representatives, serving as an "in-house clinical expert," and acting as the "primary CTC decision maker with respect to research and development." (*Id.* ¶¶ 7–9.) Nass allegedly "constantly urged Mr. Ripullo not to take on any more outside clients through EHM so that Mr. Ripullo could focus on his expanded role at CTC," and at trade conferences Nass "instructed Mr. Ripullo not to converse or interact with CTC competitors, potential EHM clients and/or vendors that were in attendance[,] reminding Mr. Ripullo that his primary role and function was to act on behalf of CTC and to further CTC interests." (*Id.* ¶ 10.)

Ripullo alleges that Nass "ratified and renewed his promise to Mr. Ripullo over a series of daily conversations with Mr. Ripullo which occurred approximately 7 to 8 times per week from the date Mr. Nass initially made his promises (approximately 2011) until approximately late 2015." (*Id.* ¶ 6.) Nass also allegedly told Ripullo "countless" times that CTC "is as much yours as it is ours." (*Id.*) At one point, he apparently "went so far as to state to Mr. Ripullo that Mr. Ripullo would accede Mr. Nass' position at CTC in the event of Mr. Nass's death, and, further, represented to Mr. Ripullo that Mr. Ripullo was a beneficiary in Mr. Nass' last will and testament, all in an effort to gain, keep, and reinforce Mr. Ripullo's trust and confidence in Mr. Nass and his representations that Mr. Ripullo had an equity interest in CTC." (*Id.* ¶ 11.) But for these representations, Ripullo alleges he never would have expanded his role at CTC. (*Id.* ¶ 12.) He further claims that "Mr. Nass made all the foregoing promises with no intention of ever performing them." (*Id.*) Nass allegedly made similar false promises regarding e-Tracer, a data management company which Ripullo, Nass, and Orlando Mansur founded as an affiliate or subsidiary of CTC in or about 2015. (*Id.* ¶¶ 13–14.)

In or about 2015, Nass entered into negotiations to sell CTC to ZimmerBiomet ("Zimmer"). (*Id.* ¶ 15.) While Ripullo does not know how much Zimmer agreed to pay in exchange for all of CTC's assets, he believes the amount to be "in the eight figures, or roughly two times CTC's most recent earnings before interest, tax, depreciation, and amortization." (*Id.*) In April 2016, Nass allegedly asked Ripullo "what are you going to do with $10 million," referring to the deal with Zimmer and Ripullo's payout. (*Id.*) Nass also allegedly "orchestrated a scheme to conceal the relationship between eTracer and CTC, as well as Mr. Nass' interest in eTracer, from Ms. Crocker" and Zimmer by creating false aliases for himself and Mansur to "avoid any financial obligations owing to Mr. [sic] Crocker as an equity owner of CTC, or to Zimmer who was acquiring the assets of CTC." (*Id.* ¶¶ 17–18.) Nass denies ever offering Ripullo an ownership position in CTC or promising to pay him any amount of money upon the sale of CTC. (Nass Decl. ¶ 11.)

When it became clear to Ripullo that Nass "would not honor his commitments to Mr. Ripullo vis-à-vis CTC from the Zimmer acquisition, Mr. Ripullo ceased performing all services on behalf of CTC and eTracer." (Compl. ¶ 19.) This action followed.

III. DISCUSSION

A district court has discretion to transfer a civil action "for the convenience of parties and witnesses, in the interest of justice," to "any other district or division where it might have been brought." 28 U.S.C. § 1404(a). Under section 1404(a), two findings are generally required for proper transfer: (1) the transferee district court is one where the action might have been brought, and (2) the convenience of the parties and witnesses and the interest of justice favor transfer. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). "The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which 'represents the parties' agreement as to the most proper forum.'" *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 581 (2013) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)). "When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied." *Id.*

Accordingly, the presence of a valid forum selection clause changes the Section 1404(a) analysis in three ways: (1) the plaintiff's choice of forum merits no weight, and instead, the plaintiff bears the burden of establishing that transfer to the bargained-for forum is unwarranted; (2) the Court "should not consider arguments about the parties' private interests," since the parties that agree to a forum-selection clause "waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation," and should only consider arguments about "public-interest" factors; and (3) "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." *Id.* at 581–82.

In cases based on diversity jurisdiction such as this, federal law governs the enforceability of forum selection clauses. *Zaklit v. Glob. Linguist Sols., LLC*, No. CV1308654MMMMANX, 2014 WL 12521725, at *6 (C.D. Cal. Mar. 24, 2014) (citing *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988)). Forum selection clauses are prima facie valid and enforceable absent a “strong showing” by the party seeking to avoid the effect of the clause “that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.” *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). The burden is on the non-moving party to show that the clause should not be enforced. *See Manetti-Farrow*, 858 F.2d at 515. Here, the parties do not dispute that the forum selection clause in the three written Agreements is valid on its face—they only dispute whether the clause governs *this* dispute. (Mot. at 3–5; Dkt. 17 [Opposition, hereinafter “Opp.”] at 4–9.)

Ripullo argues that the three Agreements are between EHM and CTC, neither of which are “parties to the instant matter,” and that Ripullo and Ness (the actual parties) are not parties to the Agreements containing the forum selection clause. (Opp. at 5.) This is unavailing. “[A] range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.” *Manetti-Farrow*, 858 F.2d at 514 n.5; *see also Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 456 (9th Cir. 2007) (discussing and applying *Manetti-Farrow*). Courts regularly “apply a forum-selection clause to a corporate officer or related company that was not part of the agreement to which it applies in his or her individual capacity . . . provided the claims in the suit related to the contractual relationship.” *Ultratech, Inc. v. Ensure NanoTech (Beijing), Inc.*, 108 F. Supp. 3d 816, 822 (N.D. Cal. 2015) (collecting cases). Here, Ripullo and Nass not only negotiated and entered into the Agreements, but they were the principal actors in EHM and CTC’s business relationship—Ripullo took on an expanded role at CTC at the request of Nass, (Compl. ¶¶ 7–9), “limited the other clients EHM accepted pursuant to Mr. Nass’ requests,” (*id.* ¶ 10), and Nass reminded Ripullo that “his primary role and function was to act on behalf of CTC and to further CTC interests,” (*id.*). Without Ripullo and Nass, there would be no relationship between EHM and CTC.

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Additionally, Ripullo's argument that Nass' purported oral promise does not arise out of the Agreements is unconvincing. (*See* Opp. at 4–6.) This promise of an ownership interest in CTC was made in exchange for Ripullo's expanded role *in CTC*. (Compl. ¶¶ 4, 7.) Even if Ripullo undertook functions at CTC beyond what is laid out in the Agreements, (*see* Opp. at 6), Nass's alleged promise arises out of the Agreements containing the forum selection clause because the Agreements explicitly state that they "establish the relationship and role" of EHM and CTC and lay out the terms of Ripullo's compensation for his work for CTC. (*See* Nass Decl. Exs. 3, 5, 8; *see also Dimarsico v. Virtela Tech. Servs. Inc.*, No. CV 12-8050-GHK (SHX), 2012 WL 12897043, at *3 (C.D. Cal. Dec. 7, 2012) ("[M]ost courts to consider the issue have rejected the argument that a purportedly separate oral contract can remove claims from the scope of a forum selection clause in a written contract governing similar subject matter.").) The last of the three Agreements were entered into after Nass allegedly began making such promises to Ripullo, so Ripullo also cannot claim that the forum selection clause was not in effect during the relevant time period. (Nass Decl. ¶ 7; *id.* Ex. 8.)

That there is "no claim for breach of written contract in any of the eight claims Plaintiff has filed against Defendant" is also unimportant. (Opp. at 5.) A forum-selection clause may apply to tort claims if those claims relate to the contractual relationship or call for interpretation of the underlying agreement. *Ultratech*, 108 F. Supp. 3d at 823. There is no question that Nass' purported promise of equity in CTC was made in exchange for work Ripullo (as EHM's principal) would do for CTC, and Ripullo and Nass' relationship was borne out of and defined by the Agreements, so Ripullo's tort claims relate to the contractual relationship laid out in the Agreements. Additionally, Ripullo alleges that, in reliance on Nass' promise, Ripullo acceded to Nass' insistence that he limit his role with other clients and not converse with CTC competitors. (Compl. ¶ 7.) Whether Ripullo would otherwise have had a right to do so turns on the express non-compete provisions in the Agreements, meaning that Ripullo's arguments also require interpretation of the Agreements. (*See* Exs. 3, 5, 8.) The Court concludes that the forum selection clause in the Agreements applies to the present dispute.

There are no extraordinary circumstances preventing enforcement of the forum selection clause in this case. Indeed, it was Ripullo that drafted the New Jersey forum selection clause. (Nass Decl. ¶ 9.) Nor do any public interest factors weigh against transfer. Regarding the availability of compulsory process, Ripullo identifies several independent contractors who worked for CTC, whom he anticipates will offer testimony regarding Ripullo's expanded role at CTC, (Opp. at 12), but these individuals were not CTC employees, (Dkt. 21-2 ¶ 5). There are, by contrast, at least seven CTC employees residing in New Jersey who would likely have better information regarding Ripullo's purported expanded role at CTC. (*See id.*) Additionally, the most important dispute in this case appears to be whether Nass in fact made a promise of equity to Ripullo, and if so, whether Ripullo is entitled to recover his claimed damages. Nass and Crocker, who reside in New Jersey, are the key witnesses who can speak to those issues, so their residence is crucial in determining whether there is sufficient availability of compulsory process. Furthermore, since Ripullo worked closely with CTC's New Jersey office, (*id.* ¶¶ 3, 9; *id.* Ex. B), and most of CTC's employees reside in New Jersey, (*id.* ¶ 3), the majority of sources of proof are also in New Jersey. The only real connection to California in this case appears to be that Ripullo currently resides here and interacted with CTC independent contractors here.[2] (*See generally* Opp.) Ripullo argues that CTC also enjoys more revenue in California than in New Jersey, (*id.* at 13), but that fact, if true, appears to have no connection to the allegations in the Complaint. Accordingly, New Jersey has a greater interest than California in the resolution of this action. This case must be transferred to the United States District Court for the District of New Jersey.

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[2] The parties dispute whether Nass has travelled to California in the past few years, (Opp. at 11; Dkt. 21 (Reply) at 21), but this dispute is immaterial since the Court cannot consider the relative convenience of the parties.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to transfer venue to the United States District Court for the District of New Jersey is GRANTED.

DATED: April 27, 2017

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE